

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 October 2014

**Public Authority:** North East Lincolnshire Council

**Address:** Municipal Offices  
Town Hall Square  
Grimsby  
South Humberside  
DN31 1HU

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from North East Lincolnshire Council ("the council"). The council withheld the information on the basis that it was subject to legal professional privilege, and was therefore exempt under section 42(1) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the council has correctly applied section 42(1) to part of the withheld information, but that the remainder is not subject to legal professional privilege and cannot be withheld on that basis.
3. The Commissioner requires the council to take the following step:
  - Disclose the 'Delegated Powers report' (with the exception of the part 7, which the Commissioner has found to be exempt under section 42(1)).
4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 12 January 2014, the complainant wrote to the council and requested the following:

*"Would you please treat this as a new FOI and provide the information you refer to in the following paragraph in your letter to me:-*

*"The Council originally determined that internal legal advice concerning the water charges and a Delegated Powers report on the surplus water charges fell within the scope of your request. It is now recognised that these documents do not fall within the scope of the request."*

6. The council requested clarification on 20 January 2014.
7. The complainant provided this on 21 January 2014:
- "The internal legal advice concerning the water charges and the Delegated Powers report on the surplus water charges."*
8. The council responded on 14 February 2014 and refused the request citing section 42(1).
9. The council subsequently provided an internal review on 4 March 2014. It maintained its position that section 42(1) was engaged.

## Scope of the case

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10. The complainant wrote to the Commissioner on 17 April 2014 to contest the council's response.
11. The Commissioner considers that the scope of this case is the determination of whether the council has correctly applied the exemption provided by section 42(1).

## Reasons for decision

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### Section 42(1) – Legal professional privilege

12. Section 42(1) provides that:

*"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."*

13. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner* and the DTA (EA/2005/0023) as:

*"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation."*

14. There are two types of privilege: litigation privilege and legal advice privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.
15. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to 'legal advice privilege' the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
16. In this case the council has confirmed that it considers that the withheld information spans both types of privilege. This is because the subject matter remains in dispute and may result in litigation being undertaken. In light of the council's position that both types of privilege apply, the Commissioner will first consider whether the withheld information constitutes advice privilege under the terms of the FOIA.

#### Advice privilege

17. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.

18. The Commissioner has viewed the withheld information, which comprises an email from legal services to the Section 151 Officer providing internal legal advice, and a document referred to as the 'Delegated Powers report' which contains (in part 7 of the document) written commentary by the Monitoring Officer that summarises external legal advice received from counsel.
19. The Commissioner is satisfied that the withheld information therefore represents legal advice provided to council officers by their legal advisers. The Commissioner is further satisfied that there is no evidence to suggest that the information has lost its confidentiality by entering the public domain. Consequently the Commissioner accepts that the withheld information attracts legal professional privilege on the grounds of advice privilege, and that on this basis section 42(1) is engaged.
20. However, the council has confirmed within its submission that it only seeks to apply section 42(1) to part 7 of the 'Delegated Powers report' that has been withheld. The Commissioner has therefore concluded that the remaining information within this document is not subject to legal professional privilege.

#### The Public Interest Test

21. As a qualified exemption, section 42(1) is subject to a public interest test. The communications must therefore be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exemption.

#### *Public interest arguments in favour of disclosure*

22. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
23. The complainant has advised the Commissioner that the council has limited the period in which it will issue water overpayment refunds, and that this decision has affected over 300 tenants. The complainant asserts that releasing the withheld information will allow the public to identify whether there are any discrepancies between the legal advice and the actions that the council has subsequently taken.

#### *Public interest arguments in favour of maintaining the exemption*

24. The council has advised the Commissioner that it considers the principle of legal professional privilege, which safeguards the openness between client and legal advisor, to be a strong argument for maintaining the exemption. The council has detailed that the substantive matter that the

legal advice relates to is the identified overcharging of service charges to council tenants, and that council tenants are currently able to seek redress by either claiming a rebate, undertaking litigation, or otherwise submitting complaint a to the council or to the Local Government Ombudsman.

25. The council has further advised the Commissioner that it considers that the legal advice relates to the private affairs of individual council tenants, and refers to their financial liabilities and entitlement to rebates. As such, the council believes that the information would additionally be exempt from disclosure under paragraph 3, Schedule 12A of the Local Government Act 1972 (as amended).
26. The importance of legal advice privilege has already been expressed by the Commissioner and the Information Tribunal in a number of previous decisions. These decisions have confirmed that the disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry*, the Information Tribunal described legal professional privilege as "*a fundamental condition on which the administration of justice as a whole rests*".
27. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on section 42 states the following:  
  
*"The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings."*
28. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept.

*Balance of the public interest test*

29. The Commissioner has considered the arguments put forward by the complainant in relation to this request, in addition to the stated position of the council and the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege.
30. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their

decisions, particularly where these decisions relate to the collection of service charges. However, having considered to the circumstances of this case, the Commissioner does not consider that the public interest in disclosure outweighs the strong public interest in maintaining the council's right to communicate with its legal advisors in confidence.

31. The Commissioner has observed that the public interest in maintaining this exception is particularly strong. To outweigh that public interest, the Commissioner would expect there to be an even stronger public interest in disclosure, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the withheld information and consideration of all the circumstances, the Commissioner did not consider that there were any such factors that would equal or outweigh the particularly strong public interest inherent in this exemption.
32. The Commissioner appreciates the complainant's concerns about the repayment of overpaid service charges, and in particular their concern that legal advice has not been correctly followed by the council. However, the Commissioner considers that the disclosure of the withheld legal advice would be of limited benefit in resolving the substantive matter for the affected parties, and that there are more appropriate routes to seeking redress, such as by referring the matter to the Local Government Ombudsman or to the courts.
33. The Commissioner has ultimately concluded that the arguments for disclosure are not greater than the arguments for maintaining the exemption, and that the exemption provided by section 42(1) has been correctly maintained.
34. On the basis that the information has been correctly withheld under the legal advice privilege limb of section 42(1), the Commissioner has not needed to consider the council's assertion that it is also subject to litigation privilege.

### **Other matters**

35. The council has not advised the Commissioner of any other exemptions that it considers may apply to the remainder of the withheld 'Delegated Powers report'. On this basis, the Commissioner has concluded that the remainder of the report does not constitute exempt information.

## Right of appeal

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36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 08707395836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**